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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

RONALD J. WOJTAS, a minor, by his next friend, JOHN C. WOJTAS, RALPH JOSEPH SCHULTE, a minor, by his next friend, WILLIAM SCHULTE, JOHN C. WOJTAS and SOPHIE WOJTAS,

Petitioners,

vs.

VILLAGE OF NILES, a Municipal Corporation of the State of Illinois,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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No.

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VILLAGE OF NILES, a Municipal Corporation of the State of Illinois,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on July 6, 1964.

CITATION TO OPINION BELOW.

The District Court filed no opinion in this case. Its final judgment order is printed in Appendix B hereto. The opinion of the Court of Appeals, printed in Appendix B hereto, is reported in 334 F. 2d 797.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on July 6, 1964. A timely petition for rehearing, filed on July 16, 1964, was denied on July 23, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED.

Illinois Revised Statutes 1963, Chapter 24, § 1-4-6, and Rule 18(b) of the Federal Rules of Civil Procedure (text of both set forth verbatim in Appendix A hereto).

QUESTIONS PRESENTED.

1. Does a District Court have pendent jurisdiction over counts asserting claims arising under state law when such counts are based on identical facts, and are joined in the same complaint, with counts asserting claims arising under the federal Civil Rights Act?

2. Does a District Court have pendent jurisdiction over a municipal corporation on claims arising under state law and upon which the municipal corporation would be a proper party under state law, when such state claims are based upon identical facts, and are joined, with claims under the federal Civil Rights Act brought against police officers who were acting on behalf of the municipal corporation?

STATEMENT OF THE CASE.

The petitioners filed their complaint in the District Court for the Northern District of Illinois. Counts One and Two of the complaint are claims for damages under the federal Civil Rights Act (42 U.S.C. § 1983, 1985, and 1986) brought against police officers of the Village of Niles, a municipal corporation of the State of Illinois.

The District Court had jurisdiction of these counts by reason of 28 U.S.C. § 1343 and the statutes cited in the preceding sentence. R.5. The respondent Village is *not* a defendant upon these counts.

Counts Three, Four, and Five are claims for damages under *state law* for false arrest and imprisonment, malicious prosecution, and assault. The District Court's jurisdiction over these counts is based on the doctrine of pendent jurisdiction because the federal and state claims are grounded upon identical facts, and also upon Rule 18(b) of the Federal Rules of Civil Procedure. R. 5-6. Damages are sought against all defendants, *including the Village*, upon these three counts.

Count Six is a claim for injunction against all defendants, including the Village, under the Civil Rights Act. The individual defendants filed answers to the merits on all counts, and the Village joined in this answer as to Count Six only.

The Village alone moved to dismiss Counts Three, Four, and Five for lack of jurisdiction. R. 29. The District Court, in a final judgment order, entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, dismissed Counts Three, Four and Five only as to the Village "on the grounds that this court has no jurisdiction . . ." R. 30, Appendix B hereto. The action is awaiting trial on the merits (except as to the parts of the complaint at issue upon this petition) in the District Court.

Upon appeal, the Court of Appeals for the Seventh Circuit not only affirmed the dismissal order, but held further that there was no jurisdiction over *any defendant* as to Counts Three, Four and Five. 334 F. 2d 797, Appendix B hereto. A timely petition for rehearing was filed and denied.

The complaint alleges as follows:

> The plaintiffs and their parents, all residents of Niles, are persons of good reputation, none of whom has ever been arrested or charged with unlawful conduct, except for minor traffic matters and the incidents set forth in the complaint. R. 6.
>
> The actions of the individual defendants complained of were committed under color of law and within the course of their duties as policemen of the Village of Niles, and were ratified by the said Village. R. 6, 17-18.
>
> On the evening of February 24, 1962, the defendant policemen unlawfully arrested, beat, threatened, and imprisoned the minor plaintiffs R. 7-9.
>
> These defendants then held the plaintiffs at the Niles police station and refused to allow them to call their parents; the parents, terrified by the absence of their sons, came to the station and found them at about 4:00 a.m. the following morning, but the plaintiff Ronald Wojtas was forced to remain in jail until 9:00 a.m. because unreasonable bail was set. R. 9-10.
>
> These defendants then knowingly filed with the magistrate's court false charges of loitering and refusing to obey a policeman against the plaintiffs; on November 30, 1962, a jury found the plaintiffs not guilty on these charges, and the plaintiffs were thereupon discharged. R. 10-11.

The allegedly unlawful conduct of the defendants is set forth only once, under Count One, and is then realleged as to the succeeding four counts because identical facts underlie the federal claims (Counts One and Two) and the state claims (Counts Three, Four, and Five). The Village is joined as a defendant only upon these state claims, but its unlawful acts for which the plaintiffs seek damages are exactly the same as those set forth in Counts One and Two.

Count Six alleges harassment and arrests of the plaintiffs and their families, and the filing by defendants of additional

false charges, subsequent to the acquittal of the minors. All of the plaintiffs seek upon this count an injunction against further harassment and false prosecutions and arrests by the Village and its policemen. R. 21-25.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below is in conflict with the Controlling Decisions of this Court on the Subject of Pendent Jurisdiction.

In *Hurn* v. *Oursler,* 289 U.S. 238, 246 (1933), this Court held that where a federal copyright claim and a state unfair competition claim were both based on performance of the same play, the trial court had pendent jurisdiction over the state claim since both claims involved "identical facts."

In *Armstrong* v. *Nu-Enamel Corporation,* 305 U.S. 315, 324-325 (1938), this Court held there was pendent jurisdiction over a claim for unfair competition arising under state law because "[t]he facts supporting a suit for infringement [arising under the federal trademark statute] and one for unfair competition are substantially the same."

Thus the decisions of this Court establish that pendent jurisdiction exists over a claim arising under state common law when that claim is based on substantially the same facts, and is joined, with a claim arising under federal statutory law. In the case at bar, the state and federal claims are based *upon identical facts.* The individual defendants filed answers to the merits on all counts and did not move to dismiss.[1] Only the defendant Village (which

[1] We recognize that consent of the individual defendants could not confer jurisdiction which is otherwise lacking. However, we submit it is significant that *none* of the individual defendants challenged the jurisdiction of the District Court over them on Counts Three, Four, and Five, and that the District Court made no ruling on this point.

was not made a defendant on Counts One and Two because of the decision in *Monroe* v. *Pape*, 365 U.S. 167 (1961), that municipal corporations may not be sued for damages under the federal Civil Rights Act) moved to dismiss for lack of jurisdiction. The District Court dismissed Counts Three, Four, and Five only "as to the defendant Village of Niles." R. 30.

The Court of Appeals, however, went farther than the District Court and held that there was *no jurisdiction over any defendant* on Counts Three, Four, and Five:[2]

> "We hold that the mere incorporation of counts Three, Four and Five, based upon Illinois law, in a complaint otherwise based entirely upon alleged violations of a federal statute and the fourteenth amendment to the constitution of the United States, does not give the district court jurisdiction of those three counts." 334 F. 2d at 799.

Thus the decision below, in holding that a federal District Court has no jurisdiction over state claims based on facts identical with those asserted in federal claims, is in conflict with *Hurn* v. *Oursler*, and *Armstrong* v. *Nu-Enamel Corporation, supra*, the controlling decisions of this Court on the subject of pendent jurisdiction. The opinion of the Court below recites familiar quotations from the *Hurn* and *Armstrong* cases, but the opinion completely fails to set forth any discussion or reasons showing why these controlling decisions do not allow pendent jurisdiction over the state claims, even though the facts underlying the state and federal claims are *identical*.

---

[2] Point 4 of the affidavit filed in support of our petition for rehearing in the court below questioned whether the opinion really intended to hold "that there is no jurisdiction over the individual policemen charged in these three Counts . . ." The Court denied the petition without comment.

Furthermore, the opinions in *Bell* v. *Hood*, 327 U.S. 678 at 686 (dissenting opinion) (1946), on remand, 71 F. Supp. 813 at 820 (S.D. Cal. 1947), show that on facts like those presented in the instant case, the District Court has pendent jurisdiction over the state claims. Unlike the situation in *Bell* v. *Hood*, our state claims must be heard because they are pendent to federal claims which undeniably present facts on which relief can be granted.

A careful reading of the above decisions illustrates conclusively that there is pendent jurisdiction over the state claims in this matter. This Court should not allow the trial of this action to proceed under the erroneous holding of the court below that the state claims must be tried in a separate action in the state court.

2. The Decision Below is in Conflict with Decisions of other Courts of Appeals.

We have found no reported decision, other than this case, involving a complaint which joins federal Civil Rights Act and state common law claims which are based on the same facts. But several courts of appeals (including the court below) and district courts have held in various contexts that pendent jurisdiction exists over state common law claims based on identical facts, and joined, with federal statutory claims. These decisions may be summarized as follows:

1. *Taussig* v. *Wellington Fund, Inc.*, 313 F. 2d 472, 476 (3d Cir.) cert. den., 374 U.S. 806 (1963)—Held that the "district court had federal question jurisdiction over the cause of action asserted under . . . the Investment Company Act of 1940 and pendent jurisdiction to determine whether the conduct in suit constituted common-law unfair competition."

2. *Errion* v. *Connell*, 236 F. 2d 447, 453 (9th Cir. 1956)—State fraud claim joined with federal claim under Securi-

ties Act based on "single fraudulent scheme arising out of the same set of facts . . .".

3. *Strachman* v. *Palmer*, 177 F. 2d 427, 430 (1st Cir. 1949)—State claim for damages to goods joined with federal claim under The Interstate Commerce Act.

4. *Jung* v. *K & D Mining Co.*, 260 F. 2d 607, 609 (7th Cir. 1958)—Claim under federal Securities Act joined with state claim for fraud arising out of same sale.

5. *United Lens Corporation* v. *Doray Lamp Co.*, 93 F. 2d 969, 974 (7th Cir. 1937)—Claim for breach of contract not to infringe a patent joined with federal claim for infringment.

6. *Caldwell-Clemets, Inc.* v. *McGraw-Hill Publishing Co.*, 12 F.R.D. 403 (S.D. New York 1952) and *Wagner* v. *World-Automobiles Corp.*, 201 F. Supp. 22, 24 (W.D. New York 1961)—State claims for unfair competition joined with federal antitrust claims.

3. The Decision Below is in Conflict with Rule 18(b) of the Federal Rules of Civil Procedure, and Fails to Consider or Even Mention this Rule, Although the Applicability of the Rule was Briefed, Argued, and Set Forth in the Petition for Rehearing.

Rule 18(b) of the Federal Rules of Civil Procedure authorizes joinder of two claims in a single action, even though under state law one of the claims could have been filed only after the other had been prosecuted to judgment. The court below was able to apply this rule correctly in *Huntress* v. *Huntress' Estate*, 235 F. 2d 205 (7th Cir. 1956).

Under section 1-4-6 of Chapter 24 of the Illinois Revised Statutes of 1963,[3] the Village of Niles may be liable to indemnify the defendant policemen, if the plaintiffs recover judgments against them at the trial in the District Court.

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[3] The full text of this statute and of Rule 18(b) are set forth in Appendix A hereto.

In *Karas* v. *Snell*, 11 Ill. 2d 233, 142 N.E. 2d 46 (1957) and in *Richichi* v. *Bielski*, 49 Ill. App. 2d 320, 199 N.E. 2d 652 (1st Dist. 1964), petition for leave to appeal to Supreme Court denied, Sept. 28, 1964,[4] the Illinois courts have held that a person who obtains a judgment against the policeman for injuries inflicted by the policeman must then file a second action against the municipal corporation to compel payment of the judgment by the municipal corporation under the indemnity statute. Since the Village could be sued under state law in a separate action after judgment was recovered herein against the individual defendants, by reason of Rule 18(b) the Village can therefore be joined as a defendant in this action.

What is more distressing to us than having failed to persuade the court below to recognize that under Rule 18(b) the Village may be joined as a defendant herein, is that the Court below completely fails to consider, or even *mention*, this rule in its opinion. The court below ignored Rule 18(b) although the applicability of the rule to this case was explicitly argued at pages 10 and 11 of our brief and upon oral argument. Paragraph 3 of the affidavit filed in support of our petition for rehearing called the attention of the court below to the fact that it had ignored Rule 18(b) and the Illinois indemnity statute. Nevertheless, the court below saw fit to deny the petition for rehearing.

Our claim based on Rule 18(b) can hardly be said not to be worth mentioning, since four judges of the District Court had previously held that in cases like this one the rule allowed municipal corporations to be made defendants.[5]

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[4] Chicago Daily Law Bulletin, Sept. 28, 1964, p. 9.

[5] *Costello* v. *City of Chicago*, No. 60 C 1566, *Duble* v. *Brown*, No. 61 C 1404, *Gonzalez* v. *General Investigations, Inc.*, No. 60 C 1806, *Washington* v. *City of Rockford*, No. 63 C 9. Unfortunately, no opinions were filed.

With deference, we submit that in failing even to mention Rule 18(b) in its opinion, the court below has acted arbitrarily and departed from the accepted and usual course of judicial proceedings.

Furthermore, if the court below is correct, then, by reason of the well known Cook County jury case backlog, the plaintiffs will have to wait at least seven years after they obtain judgments in the federal court to secure a jury trial of their indemnity claim against the municipal corporation in the state court. (The Chicago Daily Law Bulletin of October 8, 1964, shows that jury cases filed in 1957 are only now being called for trial). This delay is a luxury which victims of police brutality can ill afford (see *infra*, footnote 9), and which Rule 18(b) and the doctrine of pendent jurisdictions were fashioned to prevent. It must be remembered that plaintiffs are likely to receive no money until they have secured judgments against the municipal corporation. See, e.g., *Richichi* v. *Bielski*, *supra*, and footnote 6, *infra*.

4. The Question Presented is of Major Importance Because of Its Potential Applicability to Every Complaint for Damages filed under the Civil Rights Act in States Where Municipal Corporations are liable under State Law for the Misconduct of their Policemen.

This Court decided in *Monroe* v. *Pape*, *supra*, that municipal corporations could not be sued for damages under the Civil Rights Act for the misconduct of their policemen. But in a significant and growing number of states, including Illinois, municipal corporations may be sued under state law for misconduct by their policemen. See Appendix C hereto.

We submit that holding municipal corporations liable for the misconduct of their policemen is desirable policy

because (1) judgments against policemen may be of no value to the injured party in that policemen may be "judgment-proof" and exempt from garnishment,[6] and (2) the threat of liability may induce municipalities to show genuine concern to reduce police misconduct.[7] We do not ask this Court to adopt these notions of policy. We simply ask that in states which have already chosen to hold municipalities liable for police misconduct, the injured party, if he invokes the protection of the federal Civil Rights Act, should be free to prosecute all his claims arising out of the single occurrence in *one action* in the federal court.

It is clearly in the interest of judicial economy and substantial justice to avoid a multiplicity of actions for essentially the same claim. The whole purpose of the doctrine of pendent jurisdiction is to avoid the burden upon the parties of superfluous litigation. Furthermore, without the inclusion of the Village of Niles as a party in this matter, a judgment in favor of the police officers on the state counts would be binding in favor of the Village in the courts of Illinois. *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111 (1912), *Good Health Dairy Products Corp.* v. *Emery*, 275 N.Y. 14 (1937).

In *Hardwick* v. *Hurley*, 289 F. 2d 529, 530 (7th Cir. 1961), the court below, reluctantly following the decision of this Court in *Monroe* v. *Pape, supra*, noted with alarm that:

> "A broad interpretation of the Supreme Court's decision in *Monroe* v. *Pape* may well open the flood gates

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[6] "But many policemen are in no position to pay substantial money judgments." *Justice* 71 (1961 United States Commission on Civil Rights Report).

[7] "The Commission's studies indicate that police brutality in the United States today is a serious and continuing problem in many parts of the country." *Justice, op. cit. supra*, 26. See also pp. 70-71.

and bring into the federal trial courts thousands of assault and battery cases that should never be there. In metropolitan areas where many arrests are made daily, cases based upon this kind of claim may well completely jam what are already crowded trial calendars."

Despite the fears of the court below, we believe that the federal district courts throughout the country have been properly applying the civil rights act without having their calendars "completely jammed."[8] Prior to the granting of the motion to dismiss in the instant case in the District Court for the Northern District of Illinois, four other plaintiffs sought to name municipal corporations as defendants in complaints similar to the one filed in the instant case. In these cases four different district judges denied motions to dismiss filed by municipal corporations. See cases cited in footnote 5, *supra*.

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[8] The annual reports of the Director of the Administrative Office of the United States Courts indicate an increase in the number of private civil actions being filed under the Civil Rights Act in the district courts, although it must be recognized that cases involving claims other than those of police misconduct may be filed under this Act. The number of civil actions filed in the district courts under the Civil Rights Act is as follows (figures for the years 1958 through 1960 include cases where the United States was plaintiff):

Year	Page No.	Number of Cases
1958	185 (in 1959 report)	220
1959	185	247
1960	232	280
1961	238	270
1962	196	357
1963	198	424

Victims of police misconduct in other circuits may likewise claim pendent jurisdiction over counts naming municipal corporations as defendants, where state law permits. In the event that this petition for certiorari is denied, it is unlikely that the opinion of the court below will discourage such attempts by plaintiffs in other circuits, and thus the question presented in this petition will be presented in the future in another case. The trend of the cases and statutes set forth in footnotes 5 and 8 and Appendix C shows that the number of such attempts is likely to increase.

Plaintiffs in police brutality cases are usually not in a favorable position to bear the expense and delay of protracted trials, appellate proceedings, and retrials.[9] We submit it is desirable for victims of police misconduct, in states where municipalities are liable for such misconduct, to know whether federal district courts, in cases like the present one, will enforce their rights under state law against the municipality in a single action in the federal court.

In view of the important public and private interests involved in cases where damages are sought for police misconduct, and in view of the frequency of such cases, we submit that it is important that this Court grant this petition, and decide whether municipal corporations can be made defendants in district courts upon claims like those presented in Counts Three, Four, and Five herein. Thus victims of police misconduct will at least know whether they must file separate actions in the federal and state courts.

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[9] "Yet the victims of police brutality and racial violence are predominantly the poor and the powerless." *Justice, op. cit. supra,* 70.

5. This Court has not Clarified the Meaning and Extent of the Doctrine of Pendent Jurisdiction for Thirty-One Years.

With deference, we submit that the criteria for determining the existence of pendent jurisdiction, as stated in *Hurn* v. *Oursler, supra*, are far from clear. The leading commentators show, and this Court certainly realizes, that the decisions of the lower courts purporting to apply the doctrine of *Hurn* v. *Oursler* are impossible to reconcile. One study concludes:

> "However, it is disconcerting to note the numerous instances in which district courts faced with a pendent jurisdiction problem have merely quoted the 'single cause of action' section of the *Hurn* opinion and then concluded without any analysis, that a single cause of action was or was not presented in the case before them. If this judicial reticence has been encouraged by the difficulty of applying the conflicting approaches which the *Hurn* standards of substantiality and interrelation have evoked, confusion has been compounded by the enactment of Section 1338 (b) of the Judicial Code."
>
> Note, *The Evolution and Scope of the Doctrine of Pendent Jurisdiction in the Federal Courts*, 62 Columbia L. Rev. 1018 at 1041-42 (1962).

As another authority concludes:

> "The indefiniteness of the test propounded in *Hurn* v. *Oursler*, with its emphasis on factual identity of varying grounds for recovery as demonstrating that they arise from but a single cause of action, created difficulties for the lower courts. Some judges insisted on virtually complete identity of facts in order to bring the pendent jurisdiction principle into play, while others, with an eye to judicial economy in avoiding piecemeal litigation, believed that merely substantial

identity of facts would suffice." 1 Barron and Holtzoff, *Federal Practice and Procedure* 100 (1960).

As Professor Moore says of a large number of decisions of the lower courts on the subject of pendent jurisdiction:

> "Most, if not all, of these holdings failed to mould federal jurisdiction to the realities of litigation; were of questionable validity when decided, and are doubly so under the Revision Act of 1948." 3 *Moore's Federal Practice* 1817 (2d ed. 1963).

Professor Wechsler says that the *Hurn* formulation

> ". . . has been a source of constant difficulty and has led to close distinctions that hardly seem to have any bearing either on the general values that should govern in the administration of justice or the special value of avoiding federal intrusion in state spheres." Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 Law & Contemp. Prob. 216 at 232 (1948).

The numerous cases cited by the foregoing authorities make clear, we believe, that the lower courts have had great difficulty in consistently and intelligently applying the rule of *Hurn* v. *Oursler*. This confusion, we submit, leads to results like those in the case at bar, where the court below, in apparent conflict with the decisions of this Court, its own prior decisions, and decisions in other Circuits, holds that pendent jurisdiction is lacking even though *identical facts* underlie the federal and state claims.

We submit that this is an appropriate case for this Court to formulate in clear and contemporary terms a test of pendent jurisdiction which, unlike the formulation in the *Hurn* case, can be consistently and intelligently applied in the lower courts.

Part of the trouble with the *Hurn* rule, of course, is the Court's insistence that there be only "a single cause of action." 289 U.S. at 246. "Experience has demonstrated that this phrase, long a stumbling block in the field of pleading, has created equal confusion in the area of pendent jurisdiction." Note, *supra*, 62 Columbia Law Review at 1027.

The Federal Rules of Civil Procedure, which were promulgated after the decision in *Hurn* v. *Oursler*, of course do not employ the term "cause of action." We do not suggest that a legal formulation may become obsolete solely because it employs the term "cause of action." But, we submit that the peculiar difficulties which the lower courts have encountered in applying the *Hurn* formulation largely spring from the difficulty of applying the phrase "cause of action" in the context of modern pleading and joinder of claims.

The *Hurn* formulation allowed the Court below to reach the conclusion—which is untenable under modern concepts of pleading—that more than one cause of action is presented by the single set of facts alleged in Counts One through Five. Judge Swan has said, in noting that the traditional phrase "cause of action" was omitted from the rules, that the modern term claim means "the aggregate of operative facts which give rise to a right enforceable in the courts." *Original Ballet Russe, Ltd.* v. *Ballet Theatre, Inc.*, 133 F. 2d 187 at 189 (2d Cir. 1943).

Does this not mean that in the instant case, where an identical aggregate of operative facts underlies Counts One through Five, the district court has power to adjudicate the plaintiffs' singular claim that they have an enforceable right to recover damages against the Village and its policemen?

The necessity of employing the phrase "cause of action" in deciding questions of pendent jurisdiction leads to results, like those in the case at bar, which are grossly at variance with the flexible and pragmatic treatment which the drafters of the Rules intended to achieve by eliminating this phrase. See 2 *Moore's Federal Practice* 359 (2d ed. 1964).

An opinion by this court is necessary to clarify the doctrine of pendent jurisdiction, and to ensure consistent and intelligent results in the lower courts—to the end that cases like the one at bar, presenting federal and state counts based on *identical facts,* may be tried in one action.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Statute and Rule Involved

Ill. Rev. Stats. 1963, Ch. 24, Sec. 1-4-6.

Indemnification for injuries caused by policeman—Notice —Liability for injuries incurred while assisting policeman. § 1-4-6. In case any injury to the person or property of another is caused by a member of the police department of a municipality having a population of less than 500,000, while the member is engaged in the performance of his duties as a policeman, and without the contributory negligence of the injured person or the owner of the injured property, or the agent or servant of the injured person or owner, the municipality in whose behalf the member of the municipal police department is performing his duties as policeman shall indemnify the policeman for any judgment recovered against him as the result of such injury, except where the injury results from the wilful misconduct of the policeman, to the extent of not to exceed $50,000 including costs of suit. Any policeman, or any person who, at the time of performing such an act complained of, was a policeman, who is made a party defendant to any such action shall, within 10 days of service of process upon him, notify the municipality by whom he is or was employed, of the fact that the action has been instituted, and that he has been made a party defendant to the same. Such notice shall be in writing, and shall be filed in the office of the city attorney or corporation counsel, if there is a city attorney or corporation counsel, and also in the office of the municipal clerk, either by himself, his agent, or attorney. The notice shall state in substance, that such policeman, (naming him), has been served with process and made a party defendant to an action wherein it is claimed that a person has suffered injury to his person or property caused by such policeman; stating the title and number of the case; the court wherein the same is pending; and the date such policeman was served with process in such action, and made a party de-

fendant thereto. The municipality which is or may be liable to indemnify the policeman shall have the right to intervene in the suit against the policeman, and shall be permitted to appear and defend. The duty of the city to indemnify any such policeman for any judgment recovered against him shall be conditioned upon receiving notice of the filing of any such action in the manner and form hereinabove described. . . .

• • •

Federal Rules of Civil Procedure, Rule 18(b).—

(b) Joinder of Remedies; Fraudulent Conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

APPENDIX B.

Judgment Order of District Court and Opinion and Orders of Court of Appeals.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

* * (Caption—No. 63 C 1482) * *

ORDER

This cause coming on to be heard on motion of defendant Village of Niles to dismiss Counts III, IV and V on the grounds that this court has no jurisdiction to hear the allegations contained in said Counts, the court having considered the arguments of counsel and the brief filed in support of and in opposition to said motion, and being fully advised in the premises:

It Is Hereby Ordered that the motion to dismiss Counts III, IV and V filed by defendant Village of Niles be and hereby is granted and said Counts III, IV and V be and hereby are dismissed with prejudice and without costs as to defendant Village of Niles, and, the Court expressly finding that there is no just reason for delay, final judgment shall be and hereby is entered dismissing Counts III, IV and V as to the defendant Village of Niles.

Enter:

/s/ Edwin A. Robson
Judge

Dated: Dec 3 1963

* * *

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 14495 SEPTEMBER TERM, 1963 APRIL SESSION, 1964

RONALD J. WOJTAS, a minor, by his next friend, JOHN C. WOJTAS, RALPH JOSEPH SCHULTE, a minor, by his next friend, WILLIAM SCHULTE, JOHN C. WOJTAS and SOPHIE WOJTAS,
Plaintiffs-Appellants,

v.

VILLAGE OF NILES, a municipal corporation of the State of Illinois,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 6, 1964

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* This action was brought by Ronald J. Wojtas, a minor, by his next friend, John C. Wojtas, Ralph Joseph Schulte, a minor, by his next friend, William Schulte, John C. Wojtas and Sophie Wojtas, plaintiffs, in the district court against the Village of Niles, a municipal corporation of the State of Illinois, defendant, and certain named police officers of the village.[1]

[1] Edward P. Dennis, Clarence Emriksen, William Terpinas, Frank Wichlak, John Kraus, Frank Stankowicz, Jr., Joseph Wieboldt and Philip Cunningham.

Counts One and Two of the complaint asserted actions for damages, under the federal civil rights act, 42 U.S.C.A. §§ 1983, 1985 and 1986, against the police officers. The Village of Niles was not named as a defendant in said counts. Under counts Three, Four and Five, plaintiffs set forth actions based on Illinois state law and sought damages for false arrest and imprisonment, malicious prosecution and assault.[2]

The action is awaiting trial on the merits in the district court. Plaintiffs' brief frankly states that this appeal is predicated solely on the "error" of the court below in entering a final judgment order dismissing counts Three, Four and Five, as to defendant-appellee Village of Niles.

No diversity of citizenship is asserted in the complaint.

1. The sole contested issue before us is whether plaintiffs may maintain this action against the defendant village in a federal district court, on a cause of action arising under Illinois state law, by joining it in the same complaint with their cause of action under the federal civil rights act against police officers of the village who were acting as such when the events complained of occurred.

Because *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U.S. 175 (1909) was discussed in *Hurn* v. *Oursler*, 289 U.S. 238, 245 (1933), relied upon by plaintiffs, we shall first discuss the *Siler* case.

At 191, the Supreme Court held that when a federal district court (there known as the Circuit Court of the United States for the Eastern District of Kentucky) was presented by plaintiff with contentions that a state statute was invalid because it violated the federal constitution, it properly obtained jurisdiction, and having properly obtained it the court had the right to decide *all* the questions in the case, even though it decided the federal question adversely to the party raising it, or even if it omitted to decide it at all, but decided the case on *local or state questions only*.

[2] Count Six involved a claim for injunction against all defendants, including the village, under the civil rights act. It filed an answer to count Six.

In *Oursler*, at 245, *Siler* is recognized as stating a general rule broadly and without qualification. However, the court added that it is "a rule of general application, and we hold it to be such—as controlling in patent, trademark, and copyright cases as it was in the cases where it is announced." However, the court then said, at 245:

> "But the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal *ground*; in the latter it may not do so upon the non-federal *cause of action*."

In *Armstrong* v. *Nu-Enamel Corp.*, 305 U.S. 315 (1938), the court considered, at 324-5, the impact of *Oursler*. It said that in *Armstrong* the court's jurisdiction of one cause of action,

> "the alleged infringement of the trade-mark, persists to dealwith all grounds supporting it, including unfair competition with the marked article. The cause of action is the interference with the exclusive right to use the mark 'Nu-Enamel.' If it is a properly registered trade-mark, a ground to support the cause of action is violation of the Trade-Mark Act. If it is not a properly registered trade-mark, the ground is unfair competition at common law. The facts supporting a suit for infringement and one for unfair competition are substantially the same. They constitute and make plain the wrong complained of, the violation of the right to exclusive use."

Further, in *Armstrong*, at 325, the court added:

> "• • • Registration of 'Nu-Enamel' furnished a substantial ground for federal jurisdiction. That jurisdiction should be continued to determine, on substantially the same facts, the issue of unfair competition."

However, at 333, in note 19, the court said:

> "Since neither party has relied *upon state law*, we do not consider any effect it might have on our conclusions." (Italics supplied.)

We do not consider that anything said in *Armstrong* supports the contention of plaintiffs in the case at bar.

We hold that the mere incorporation of counts Three, Four and Five, based upon Illinois law, in a complaint otherwise based entirely upon alleged violations of a federal statute and the fourteenth amendment to the constitution of the United States, does not give the district court jurisdiction of those three counts.

2. Moreover, the lack of diversity of citizenship between plaintiffs and the Village of Niles, an Illinois municipal corporation, is fatal to the district court's jurisdiction to adjudicate upon these three counts. *McPherson* v. *Hoffman*, 6 Cir., 275 F. 2d 466, 470 (1960); *Pearce* v. *Pennsylvania R. Co.*, 3 Cir., 162 F. 2d 524 (1947), cert. denied, 332 U.S. 765; *Wasserman* v. *Perugini*, 2 Cir., 173 F. 2d 405 (1949); *Kern* v. *Standard Oil Company*, 8 Cir., 228 F. 2d 699, 701 (1956); and *Kerr* v. *Compagnie de Ultramar*, 2 Cir., 250 F. 2d 860 (1958) at 864, where the court said:

> "• • • Because, however, of the limitations on federal jurisdiction, such otherwise proper joinder destroys the jurisdiction of the court. • • •"

For these reasons, the judgment order from which this appeal has been taken is affirmed.

JUDGMENT ORDER AFFIRMED.

• • •

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Monday, July 6, 1964

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

RONALD J. WOJTAS, a minor, etc., et al.,
Plaintiffs-Appellants,

No. 14495 vs.

VILLAGE OF NILES, a municipal corporation of the State of Illinois,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment order of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this day.

• • •

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

Thursday, July 23, 1964

Hon. Elmer J. Schnackenberg, Circuit Judge
Hon. Win G. Knoch, Circuit Judge
Hon. Latham Castle, Circuit Judge

RONALD J. WOJTAS, et al.,
Plaintiffs-Appellants,

No. 14495 vs.

VILLAGE OF NILES, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for a rehearing of this cause, filed by plaintiffs-appellants, be, and the same is hereby DENIED.

APPENDIX C

Table of States in Which Municipal Corporations May Be Held Liable for Misconduct by Their Policemen.[10]

I. *States and city in which governmental immunity has been abolished by statute or ordinance.*

1. Alabama—Code 1940, Title 37, § 502
2. California—Deering's Govt. Case Ann., §§ 815.2, 825, 825.2
3. Hawaii—1963 Supp. to Rev. Laws of 1955, § 245-A-2
4. Minnesota—Minn. Stats. Ann. 1963, § 466.02
5. New York—29A McKinney's Consolidated Laws of New York, Court of Claims Act, § 8 (1963)
6. Washington—Rev. Code of Wash. Ann., Title 4, § 4.92.090, as amended in cum. supp. 1963
7. Philadelphia, Pa.—Philadelphia Code, § 21-701.

II. *States in which governmental immunity of municipal corporations has been abolished by court decision.*

1. Alaska—*Scheele* v. *City of Anchorage,* 385 P. 2d 582 (1963)
2. Arizona—*Stone* v. *Arizona Highway Commission,* 93 Ariz. 384, 381 P. 2d 107 (1963)
3. Florida—*Hargrove* v. *Town of Cocoa Beach, Fla.,* 96 So. 2d 130 (1957)
4. Illinois—*Molitor* v. *Kaneland Community Unit Dist. No. 302,* 18 Ill. 2d 11, 163 N.E. 2d 89, 86 A.L.R. 2d 469 (1959), *Lynwood* v. *Decatur Park District,* 26 Ill. App. 2d 431 at 435, 168 N.E. 2d 185 (3d Dist. 1960)
5. Kentucky—*Haney* v. *Lexington,* .....Ky. ....., ... S. W. 2d ..... (1964)

[10] Some states are listed under more than one heading.

6. Michigan—*Williams* v. *City of Detroit*, 364 Mich. 231, 111 N.W. 2d 1 (1961)
7. New Jersey—*McAndrew* v. *Mularchuck*, 33 N.J. 172, 162 A. 2d 820 (1960)
8. New York—*McCrink* v. *New York*, 296 N.Y. 99, 71 N.E. 2d 419 (1947), *McCarthy* v. *City of Saratoga Springs*, 269 A. D. 469, 54 N.Y.S. 2d 600, app. den., 269 A. D. 912, 57 N.Y.S. 2d 653 (1945).
9. Nevada—*Rice* v. *Clark County, Nev.*, 79 Nev. 253, 382 P. 2d 605 (1963) (sovereign immunity does not extend to counties to relieve them of negligence in operation of roads)
10. Wisconsin—*Holtyz* v. *City of Milwaukee*, 17 Wis. 2d 26, 115 N.W. 2d 618 (1962)
11. Washington—*Kelso* v. *City of Tacoma*, 63 Wash. Decs. 2d 912, 390 P. 2d 2 (1964)

III. *States in which the doctrine of governmental immunity has been altered or abolished in cases where the municipal corporation has insurance.*

1. Connecticut—Gen. Stats. § 7-465
2. Idaho—Gen. Laws Ann. § 41-3505
3. Indiana—*Flowers* v. *Board of Commissioners*, 240 Ind. 668, 168 N.E. 2d 224 (1960)
4. Missouri—Ann. Mo. Stats. 1963 cum. supp. § 71.185
5. New Hampshire—Rev. Stats. Ann., Vol., 4 § 412.3
6. North Dakota—N.D. Century Code Vol. 8, § 40-43-07
7. Oregon—Ore. Rev. Stats., Vol. 2 1963, § 243.110
8. Tennessee—*Ballew* v. *City of Chattanooga*, 205 Tenn. 289, 326 S W. 2d 466 (1952)
9. Vermont—Title 12, Vt. Stats. cum. supp. 1963, § 5601, Title 29, cum. supp. 1963, § 1403

10. Wyoming—Wyo. Stats. Ann., Vol. 5, cum. supp. 1963, §§ 15-20.6, 15-20.7

IV. *States in which governmental employees are indemnified for judgments obtained against them for torts committed while carrying out their duties.*

1. Connecticut—Gen. Stats. § 7-465
2. Illinois—Ill. Rev. Stats. 1963, Ch. 24, §§ 1-4-5, 1-4-6

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 592

RONALD J. WOJTAS, A MINOR BY HIS NEXT FRIEND, JOHN C. WOJTAS, RALPH JOSEPH SCHULTE, A MINOR, BY HIS NEXT FRIEND, WILLIAM SCHULTE, JOHN C. WOJTAS AND SOPHIE WOJTAS,

Petitioners,

vs.

VILLAGE OF NILES, A MUNICIPAL CORPORATION OF THE STATE OF ILLINOIS,

Respondent.

BRIEF OF THE VILLAGE OF NILES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 592.

RONALD J. WOJTAS, a minor, by his next friend, JOHN C. WOJTAS, RALPH JOSEPH SCHULTE, a minor, by his next friend, WILLIAM SCHULTE, JOHN C. WOJTAS and SOPHIE WOJTAS,

Petitioners,

vs.

VILLAGE OF NILES, a Municipal Corporation of the State of Illinois,

Respondent.

BRIEF OF THE VILLAGE OF NILES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

STATEMENT OF CASE.

Counsel's statement that counts 3, 4, and 5 are grounded upon "identical facts" with counts 1 and 2 is in error.

Counts 3, 4, and 5 are based upon the law of Illinois. In each of counts 3, 4 and 5 Plaintiffs make the following allegation not found in counts one and two:

> "19 • • •. The actions of the individual defendants hereinabove set forth and complained of upon this count were committed within the course of the duties of the said individual defendants as police officers of

> the said Village of Niles acting within the scope of their authority as such, and the said actions were either committed pursuant to the orders, commands, customs and usages of the said Village or were afterwards ratified, approved and acquiesced in by the said Village or both." (Plf. App. 14, 16, 16 17.)

Counsel's assertion that the Court of Appeals held that there was no jurisdiction of any defendant as to counts 3, 4, and 5 (Pet. 3) is in error. The District Court dismissed the counts as to the Village of Niles. The Court of Appeals affirmed this order. No other question was decided by the Court of Appeals.

The fact that plaintiffs have an alleged cause of action under the Federal Civil Rights Statute against police officers does not give the court jurisdiction of an alleged cause of action to recover money damages from the Village of Niles since the Village is not liable for damages under the Civil Rights Statute.

In *Monroe* v. *Pape* (1961), 365 U. S. 167, 5 L. Ed. 492, 81 S. Ct. 473, the court held that the word "person" as used in the Civil Rights Statute does not include Municipal Corporations:

> "The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by Act of April 20, 1871, was so antagonistic that we cannot believe that the word 'person' was used in this particular Act to include them." 365 U. S. 167 at 191.

The court further stated that for this reason the district Judge had properly dismissed the complaint as to the municipal corporation.

> "Accordingly we hold that the motion to dismiss the complaint against the City of Chicago was properly granted. But since the complaint should not have been dismissed against the officials the judgment must be and is reversed." 365 U. S. 167 at 192.

Plaintiffs cannot maintain their claim for damages under state law against the Village of Niles in the Federal Court since there is no diversity of citizenship.

In *McPherson* v. *Hoffman*, 275 F. 2d 466, Hoffman was injured in a collision of a truck of the Chesapeake and Ohio Railway with an automobile of McPherson. Hoffman sued Chesapeake in the Federal Court under the Federal Employers Liability Act. Chesapeake filed a third-party complaint against McPherson. Hoffman amended his complaint making McPherson a party. Hoffman recovered judgment against Chesapeake and McPherson. In reversing the judgment the court pointed out that Hoffman and McPherson were both citizens of Michigan. The court held that the district court had no jurisdiction to enter a judgment against McPherson in favor of Hoffman. The holding of this case answers every argument made by petitioners.

In *Pearce* v. *Pennsylvania Railway Co.*, 162 F. 2d 524, plaintiff sued Pennsylvania Railroad and Hofkin. The suit against the Pennsylvania Railroad was based upon the Federal Employers Liability Act and the Safety Appliance Act. Hofkin and plaintiff were residents of Pennsylvania. Plaintiff asked to recover for injuries suffered by the negligence of the two defendants or by the negligence of one of them.

The trial court dismissed the suit as to Hofkin for lack of jurisdiction. The Court of Appeals affirmed. This case answers the contentions in petitioners' brief.

In *Wasserman* v. *Perugini*, 173 F. 2d 305, plaintiff sued to recover for injuries sustained in a collision of a taxi cab and a Post Office mail truck. The plaintiff sued the United States under the Federal Tort Claims Act and the cab operator under state law. The trial court held that the mail truck was not the cause of the injury. It dis-

missed the complaint against the operator of the taxi cab for want of jurisdiction. At page 306 the court said:

> "• • • the plaintiffs could not assert a claim against defendants having the same citizenship irrespective of any rights of contribution from such defendants which the United States might possess."

There is no pendant jurisdiction over a party against whom the plaintiff has no basis to assert a Federal cause of action.

In *Kerr v. Standard Oil Company*, 228 F. 2d 699, plaintiff, a resident of Minnesota sued Standard Oil Company, Inc., incorporated in Indiana and a Minnesota resident, the driver of the Standard Oil Company vehicle. Plaintiff was injured in a collision with the vehicle. Plaintiff recovered judgment against both defendants.

The Court of Appeals reversed because there was no diversity of citizenship between the driver of the truck and plaintiff.

In *Kerr* v. *Compagnie De Ultramar*, 250 F. 2d 860, plaintiff and one of the defendants were citizens of the same state. The defendant filed a motion to dismiss. The plaintiff filed a cross-motion asking to dismiss the complaint as to the resident defendant. The court dismissed the entire suit.

The Court of Appeals held that the plaintiff should be permitted to dismiss the resident defendant.

In this case there is no diversity of citizenship between the plaintiffs and the Village of Niles. Plaintiffs do not claim any colorable cause of action against the Village of Niles under Federal Law. Hence, there is no jurisdiction for plaintiffs to sue the Village of Niles in the Federal Court.

Professor Moore shows that third-party proceedings cannot be used to confer jurisdiction:

> "In the first edition of this Treatise the view was taken that if, as permitted under the Rule, plaintiff A. B. amended his complaint to state a claim against the third-party defendant E. F., independent grounds of jurisdiction would be required to support plaintiff's claim against E. F. The concept of ancillary jurisdiction was not regarded as extending so far as to permit a plaintiff, by this round-about method, to recover a judgment against a citizen of the same state on a nonfederal cause of action." Moore's Federal Practice, 2nd Ed. Vol. III p. 721 ¶ 14.27.

In each of the cases cited in Petition 7 to 8 the plaintiff stated a cause of action against the defendant based on Federal Law. Here plaintiffs have no cause of action of any kind or character against the Village of Niles under Federal Law. They attempt to confer jurisdiction by joining a purely state law cause of action in a cause of action based on Federal Law.

Even where the state law action is against the same defendant as the federal cause of action, the rule of pendant jurisdiction does not permit a federal court to assume jurisdiction of a separate and distinct nonfederal cause of action in the absence of diversity of citizenship.

Hurn v. *Oursler*, 289 U. S. 238, 53 S. Ct. 586, 77 L. Ed. 1148.

Plaintiffs admittedly have no cause of action against defendant, the Village of Niles, under Federal Law. The cause of action under state law is separate and distinct from any cause of action under Federal Law.

In *Hurn* v. *Oursler*, 289 U. S. 238, plaintiff sued to enjoin production of a play on the ground that it infringed plaintiff's copyrighted play. Plaintiff had revised the copyrighted play but the revision had not been copyrighted. Plaintiff submitted the original and the revised to defendant to produce. Plaintiff sued for infringement of the

copyrighted play and for unfair competition with respect to the copyrighted play and the uncopyrighted revision. The court at pages 245-246 made a cryptic statement of pendant jurisdiction:

> "But the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct non-federal cause of action because it is joined in the same complaint with a federal cause of action. The distinction to be observed is between a case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question, and a case where two separate and distinct causes of action are alleged, one only of which is federal in character. In the former, where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal GROUND; in the latter it may not do so upon the non-federal CAUSE OF ACTION."

The court further said, 289 U. S. 238 at 248:

> "* * * The bill as amended, sets forth facts alleged to be in violation of two distinct rights, namely, the right to the protection of the copyrighted play, and the right to the protection of the uncopyrighted play. From these averments two separate and distinct causes of action resulted; one arising under a law of the United States, and the other arising under general law. For reasons that have already been made manifest, the latter is entirely outside the federal jurisdiction and subject to dismissal at any stage of the case."

Since the plaintiff here does not assert any claim of any nature against the Village under Federal Law, it is impossible under the holding of this case for the court

to have any jurisdiction over the Village on the theory of pendant jurisdiction.

We respectfully submit that the petition should be denied.

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